IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.300 OF 1984

Namdeo Shiva Koli,
since deceased by his heirs and legal representatives:
1-A. Sopan Namdeo Koli
1-B. Mahadeo Namdeo Koli
1-C. Vishwanath Namdeo Koli
1-D. Vaijayantabai Namdeo Koli .. Appellants

All residing at Girjani, Taluka Malsiras,
Dist. Solapur.

(Amended as per court order dated 21.8.97 in
Civil Application No.263 of 1992)

v/s.

1. Subhadra Masu Pawar (Since deceased)
2. Baburao Bala Pawar, since deceased by his
legal heirs:

2a. Anant Baburao Pawar
2b. Arvind Baburao Pawar
2c. Nanda Baburao Pawar
2d. Kantilal Baburao Pawar .. Respondents
Amendment carried out as per court's order
dated 4.8.2006 in C.A.No.862 of 2004.

All residing at Ramayan Chowk, Akluj,
Tal.Malshiras, Dist. Solapur.

ALONGWITH

SECOND APPEAL NO.442 OF 1984

Mahadeo Jagu Sonavale .. Appellant
v/s.
Masu Bala Pawar, since deceased by his heirs
and legal representatives:
1A. Subhadra Masu Pawar (Since deceased)
1B. Baburao Bala Pawar, since deceased by his
legal heirs:

1B1. Anant Baburao Pawar
1B2. Arvind Baburao Pawar
1B3. Nanda Baburao Pawar
1B4. Kantilal Baburao Pawar .. Respondents

All residing at Ramayan Chowk, Akluj,
Tal. Malshiras, Dist. Solapur.

Amendment carried out as per court's order
dated 4.8.2006 in C.A. No.841 of 2004.

Ms. A.R.S. Baxi for the appellants.
Mr. K.Y. Mandlik for the respondent Nos.2A to 2D.

CORAM : ABHAY S. OKA, J.
DATED : 29TH NOVEMBER, 2007

ORAL JUDGMENT

Heard the learned advocates appearing for the parties.

2. It is not in dispute that the facts of the cases involved in both the appeals are similar and, therefore, I am referring to the facts of the case in second appeal No.300 of 1984.

3. Both the appeals are filed by original defendants. For the sake of convenience, parties in the appeals are hereinafter referred to with reference to their status in the trial court.

4. The suit for specific performance of agreement dated 25th June, 1974 executed by the defendants has been decreed by the trial court and the decree passed by the trial court has been confirmed in appeal.

5. According to the case of the original plaintiff, the first defendant in his capacity as Karta of his joint family, agreed to sell the suit land, more particularly described in the plaint, in favour of the original plaintiff for the price of Rs.10,700/-. According to the case of the original plaintiff, on 25th June, 1974,

he paid a sum of Rs.5000/- and executed an agreement for sale. According to the case of the plaintiff, sale deed was to be executed after the first defendant obtained the requisite permission of the competent authority and at the time of execution of the sale deed, balance consideration was to be paid by the plaintiff. On 18th June, 1977, the original plaintiff through his advocate issued notice to the defendant setting out the details of the agreement for sale and contending that a total amount of Rs.6944/- has been paid to the first defendant. It was stated in the notice that the suit land has been acquired for an irrigation project and, therefore, it is not possible to execute the conveyance in terms of the said agreement. Therefore, original plaintiff demanded the aforesaid amount of Rs.6944/- together with interest. Admittedly, the said notice was received by the first defendant and no reply was sent by the first defendant.

6. On 13th July, 1977, the original plaintiff filed a suit for recovery of a sum of Rs.6979/-. In the plaint, an averment made is that for the purposes of an irrigation project, the State Government has decided to acquire the suit land and proceedings have been initiated. Written statement was filed by the defendants on 8th February, 1978 raising various

contentions. The defendants denied the allegation that the suit land was being acquired by the State Government. It was alleged that the first defendant was making efforts for obtaining requisite permission for the sale. It was stated that the first defendant was ready and willing to executed the conveyance, provided balance consideration of Rs.7,000/- was paid. In the written statement, a case made out was that the agreed consideration is Rs.12,000/-.

7. On 20th June, 1979, the original plaintiff applied for amendment of the plaint by filing an application at Exhibit 19. The said application was allowed by order dated 6th September, 1979. By amendment, the plaintiff prayed for specific performance of the agreement. In the amended plaint, it is stated that after the institution of the suit, the original plaintiff learnt that the proposal for acquisition has been cancelled. It is stated that after the institution of the suit, the acquisition has been cancelled and hence, cause of action has arisen for claiming a relief of specific performance. By amendment, it was asserted that the original plaintiff was ready and willing to pay the balance consideration and to get the sale deed executed. No additional written statement was filed to the said amended

portion.

8. The trial court framed various issues. The trial court held that the original plaintiff has established that he had paid a sum of Rs.6000/- by way of earnest money as the said fact was admitted by the defendants. The trial court, however, accepted that the total agreed consideration was of Rs.10,700/-. The trial court held that the suit land being bagayat land, there was no necessity of obtaining approval of the competent authority in view of the amendment to the provision of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The trial court proceeded to pass a decree for specific performance. In the appeal preferred by the first and third defendants, the decree for specific performance has been confirmed.

9. The second appeal was admitted on 14th June, 1984 by passing the following order:-

> "Heard Shri Patankar.
> Admitted on the point of law mentioned in ground No.2 of the appeal memo."

10. Ground No.2 which is stated to involve substantial question of law reads thus-

> "(2) It is submitted that as the Respondents gave notice dated 18th June 1977, terminating the agreement and claiming back the earnest amount, the contract to purchase came to an end; and therefore, there could have been no specific performance when the contract was not in existence."

11. The submission made by the learned advocate for the appellants is that, by the act of issuing notice dated 18th June, 1977, the original plaintiff abandoned the suit agreement and demanded refund of part of the consideration alongwith interest. She submitted that after having abandoned the agreement which had effect of termination of the agreement, the original plaintiff was not entitled to a decree for specific performance. She submitted that no evidence has been led by the original plaintiff to show that he was always ready and willing to perform his part of contract. She placed reliance on the decision of the Apex Court in the case of Swarnam Ramachandran (Smt.) and another v. Aravacode Chakungal Jayapalan, (2004)8 SCC, 689 and submitted that original plaintiff was not entitled to the relief

of specific performance. The learned advocate appearing for the legal representatives of the original plaintiffs (respondents) supported the impugned judgments and decrees.

12. I have carefully considered the submissions. The second appeal is to be heard and decided on the substantial question of law which has already framed. Though the appeal is of the year 1984, the appellants have not applied till today for exercise of powers under the proviso of sub-section (5) of section 100 of the Civil Procedure Code, 1908 for framing any other substantial question of law. Therefore, I have dealt with the submissions made by the learned advocate for the appellants on the substantial question of law which is stated to be arising from ground No.2 of Memorandum of Appeal.

13. In so far as execution of the suit agreement is concerned, there is no dispute between the parties. The only dispute was as regards the agreed consideration. According to the original plaintiff, the agreed consideration was Rs.10,700/- and according to the defendants, the agreed consideration was Rs.12,000/-. On that aspect, there is a finding of fact recorded by the trial court that the agreed consideration was Rs.10,700/-.

The submissions made by the advocate who appeared for original defendants before the District Court have been recorded in paragraph 6 of the judgment of the District Court which disclose that there was no challenge by the appellants before the District Court to the finding as regards the agreed amount of consideration. In the written statement and in particular in para 7 thereof, the defendants have stated that they were ready and willing to execute the sale deed and, therefore, the defendants were in the process of obtaining the requisite permission of the competent authority. Thus, the fact that the first defendant was required to obtain requisite permission is also admitted in the written statement. The learned trial Judge has recorded the finding that the sum of Rs.6000/- was paid by the original plaintiff to the first defendant. In paragraph 8 of the written statement, the defendant has stated that if the plaintiff was willing to pay the balance consideration of Rs.7000/-, the first defendant was ready and willing to execute the conveyance.

14. Now turning to the notice dated 18th June, 1977, the advocate for the original plaintiff has referred to the transaction of suit agreement and the fact that the amount of Rs.6944/- has been paid to the first defendant. The said notice is not a notice

of termination. The notice records that suit land has been acquired by the State Government for irrigation project and, therefore, now it was not possible to execute the sale deed. Therefore, by the said notice, the original plaintiff demanded refund of the amount paid to the first defendant. As pointed out earlier, the first defendant did not reply to the said notice. The suit was immediately filed thereafter on 13th July, 1977 on the basis of the same assertions in the notice claiming refund of the amount. In the written statement filed in February, 1978, the defendants denied the fact that the suit land was under acquisition. Thereafter, on application at Exhibit 19 filed by the original plaintiff, the trial court permitted the original plaintiff to amend the plaint. In the amendment, a contention has been raised that after institution of the suit, the original plaintiff became aware of the fact that the acquisition has been cancelled. It was asserted by the amendment that the plaintiff was ready and willing to pay the balance amount and therefore, relief of specific performance was prayed for. It is pertinent to note that after the amendment of plaint, the defendants neither filed additional written statement nor amended the written statement for dealing with the amendments made in the plaint. In the written statement, according to the case of the

defendants, permission of the authority was to be obtained by the first defendant. According to the defendants, only a sum of Rs.5000/- was paid by the original plaintiff. However, the defendants did not dispute that the balance consideration was to be paid only at the time of execution of the conveyance. The defendants asserted that the first defendant was making efforts to obtain clearance from the competent authority. As stated earlier, in paragraph 8 of the written statement the defendants specifically stated that they are willing to execute the sale deed provided the balance amount of Rs.7000/- was paid by the plaintiff.

15. On the date of institution of suit as well as on the date the plaint was amended, the defendants had not come out with the case that either they had obtained clearance of the competent authority or such clearance or permission was not required. Therefore, till the date on which amendment was carried out, there was no question of original plaintiff offering payment of balance consideration as the same was to be paid at the time of execution of the sale deed after requisite permission/clearance was obtained by the first defendant. In the amended plaint, an assertion has been made by the plaintiff that

he was ready and willing to pay the balance amount for obtaining conveyance. As stated earlier, by the amended plaint, it was asserted that after filing of the suit, the original plaintiff came to know that the acquisition proposal has been cancelled. There is no written statement filed by the defendants dealing with the averments in the amended portion of the plaint.

16. Thus, considering the factual aspects and the stand specifically taken by the defendants in the written statement, it cannot be said that by sending notice dated 18th June, 1977, the plaintiff abandoned the agreement. It is pertinent to note that no reply was sent by the defendants to the said notice by raising the contention that there was no acquisition proposal. It is, thus, clear that the act of issuing the said notice will not amount to either abandonment or termination of the contract.

17. In paragraph 10 of the judgment of the appellate court, it has been rightly held that the notice does not amount to termination of contract. Therefore, the act of issuing notice will not act as any impediment in passing a decree for specific performance as it is an admitted position that the proposal for acquisition no longer existed and that in the written statement,

the defendants specifically agreed to execute the conveyance on receipt of the balance consideration.

18. In view of the aforesaid discussion, there is no merit in the second appeal and the same is liable to be dismissed. For the same reasons, second appeal No.442 of 1984 is liable to be dismissed. Hence, I pass the following order:-

ORDER

Second appeal No.300 of 1984 and Second Appeal No.442 of 1984 are dismissed with no order as to costs.

ABHAY S. OKA, J.